Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

REXFORD LEROY NEWMAN, JR.,
Petitioner

v.

COUNTY OF ORANGE; MATTHEW JOHNSON;
JEFFREY PUSKAS,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an issue of great national importance, especially for those persons within the territory of the United States Court of Appeals for the Ninth Circuit, who seek damages for injuries suffered by them for enduring a false and malicious criminal prosecution that was caused by the knowingly false material statements of fact contained in arrest reports upon which the public prosecutor relied in deciding to file criminal proceedings against such persons:

1) Is the uncorroborated sworn testimony of a 42 .U.S.C. § 1983 plaintiff that shows with factual specificity, that those material facts contained in the defendant police officer's arrest report upon which the public prosecutor relied in deciding to pursue criminal charges against the plaintiff, were materially false and misleading, sufficient evidence to withstand the defendant police officer's motion for summary adjudication on those damages caused by the filing of the underlying criminal action.

2) Is the purpose of the presumption of regularity of governmental proceedings, in this case the presumption of prosecutorial independent judgment, a rule established to simply limit the liability of police officers when the plaintiff has no evidence to corroborate his own material version of the facts that contradicts the defendant police officer's version, or is it a rule merely placing the burden of production on the nonmoving party opposing a summary

judgment motion to come forward with some competent evidence to rebut the presumption.

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Petitioner seeks review of the published opinion rendered herein by the United States Court of Appeals for the Ninth Circuit, which is reported as 457 F.3d 991, and is Ninth Circuit Case Number 04-56103. A copy of said Ninth Circuit's published opinion of August 6 2006 is reproduced in the Appendix as (1a-11a)[1]. The order denying Petitioner's (Appellant's) Petition For Rehearing And Suggestion For Rehearing *En Banc* of September 14, 2006 is reproduced in the Appendix as (15a). The Amended Order of the United States District Court for the Central District of California of March 19, 2004, is unreported. A copy of the document is reproduced in the Appendix as (12a-14a.)

JURIDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on August 6, 2006. The order of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's (Appellant's) Petition For Rehearing And Suggestion For Rehearing *En Banc* was filed on September 14, 2006. On December 6, 2006, Justice Anthony Kennedy granted Petitioner's application for an extension of time to file Petitioner's Petition for Writ of Certiorari, permitting Petitioner to file his instant Petition for Writ of Certiorari with this honorable court, to and including December 28, 2006. The jurisdiction of this honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

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[1] Citations to the Appendix to the Petition are shown as (__ a.)

A. Petitioner's Version Of Material Facts

Petitioner Rexford LeRoy Newman, Jr.'s ("Petitioner"), version of the material facts are as follows: On December 17, 2001 Petitioner was stopped by defendant / respondent Orange County Sheriff's Department motorcycle Deputy Sheriff Matthew Johnson ("Johnson"), for an alleged violation of Cal. Veh. Code § 22350: unsafe peed (61 mph in a 45 mph zone), in San Juan Capistrano, Orange County, California[2]. Petitioner explained to Johnson that he had not had a traffic violation in sixteen years, and that he was only trying to get around a van because the van was driving erratically, and asked Johnson if it was possible that he only receive a warning; to which Johnson replied "Not a chance." Petitioner then asked Johnson if the fact that his father was a Deputy Sheriff would carry any weight, and Johnson again said "No way". Petitioner also apparently aggravated Johnson by spending two minutes in reading over the traffic citation following Johnson telling Petitioner to just sign the citation.

Following Johnson tearing off the citation and handing it to Petitioner, Petitioner drove-off, wishing Johnson a "Merry Christmas". Apparently not caring for Petitioner's parting comments, Johnson mounted his motorcycle, and very shortly thereafter, again stopped Petitioner; this time for allegedly spraying dirt and rocks on Johnson with Petitioner's rear tire when Petitioner

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[2] Petitioner is not the "typical" 42 U.S.C. § 1983 plaintiff. Mr. Newman, the son of a Chautauqua County, New York, Deputy Sheriff, was an Eagle Scout at 15 years of age, his class President at Pennsylvania Military Academy for his Sophomore, Junior and Senior years, a career U.S. Air Force B-52 commander (that carried strategic nuclear weapons), and (at the time of the subject December 17, 2001 incident), a newly retired American Airlines Captain, with a total of 31 years with that company.

left Johnson[3]. Petitioner was then told by Johnson to get out of his Jeep, and that Petitioner was going to jail for assault and battery on a peace officer[4]. When Petitioner complied and got out of his Jeep, Johnson stepped back into oncoming traffic lanes[5], and Petitioner told Johnson to come back toward him; verbally and via arm gestures, so that Johnson would not get hit by a passing car. Petitioner then complied with additional orders by Johnson to go sit on the curb. When he did so, Johnson came running at Petitioner; pepper-spraying him, pouncing on him and otherwise brutalizing him; all unlawfully, unreasonably and unnecessarily. Johnson literally went berserk on Petitioner, who suffered, *inter alia*, broken ribs, a collapsed lung, and numerous contusions, cuts and scrapes. While Johnson was attacking Petitioner, Orange County Sheriff's Department Deputy Sheriff Jeffrey Puskas ("Puskas") jumped in the fracas[6] and helped Johnson brutalize and unlawfully arrest Petitioner, and assisted in arresting and searching Petitioner and his Jeep.

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[3] The jury in the criminal action did not believe that Johnson had been sprayed with anything by Petitioner's Jeep leaving the scene of the stop.

[4] Johnson later testified that he did not believe that Petitioner intentionally sprayed him with dirt, rocks or anything else.

[5] With cars passing behind him in the same.

[6] Puskas was a back-up deputy. His patrol video system tape shows that when he arrived at the scene, that Deputy Johnson had Petitioner proned-out on an eight inch granite curb, with the top part of Petitioner's body on the grass / dirt area, and with his lower body on the street area; all while Deputy Johnson was basically leaning on Petitioner and jamming Petitioner's left arm up the center of his back. Petitioner can be seen trying to cooperate with Deputy Johnson, by Petitioner moving his own right hand, behind Petitioner's back and toward his left hand, so that Deputy Johnson would just handcuff him so he could breath. The weight of Deputy Johnson's body was jamming Petitioner's ribs into the curb; breaking at least one rib.

Petitioner was subsequently taken to the Orange County Jail and booked for assault and battery on a peace officer and for resisting arrest.

Based on the bogus material allegations contained in Deputy Johnson's Initial Crime Report, on December 27, 2001 the Orange County District Attorney's Office filed the underlying criminal action against Petitioner for violation of Cal. Penal Code § 148(a)(1); resisting / obstructing / delaying a peace officer engaged in the performance of his duties, for Petitioner's alleged assaultive actions against Johnson following the second traffic stop[7].

B. Johnson's Version Of Material Facts

In addition, Johnson filed a materially false and misleading "Initial Crime Report" with the Orange County Sheriff's Department, in an effort to frame Petitioner. For example, in Johnson's "Initial Crime Report" he stated, *inter alia*, that following Petitioner leaving the scene of the first traffic stop:

> "I got back on my motorcycle and initiated a traffic enforcement stop on Newman. He was attempting to make a left turn into a car wash. I pulled my motorcycle along side his driver's side and told him to pull to the right. Newman said, "no, I'm going to the car wash". I again told Newman to move his vehicle to the right shoulder. Newman complied and moved his vehicle to the right shoulder. I approached

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[7] Petitioner was never prosecuted for his tires allegedly spinning and allegedly propelling dirt and debris at Deputy Johnson. Petitioner was also prosecuted for violation of Cal. Veh. Code § 22350 (speeding), but that infraction was dismissed by the Superior Court in plaintiff's favor at trial.) No assault or battery charges were ever filed.

Newman's driver's side window and told him to exit the vehicle. Newman said, "why just because of a little dirt, I don't see any dirt on you". I again told Newman to exit the vehicle. He complied and I escorted him the rear of his vehicle. I attempted to tell him that I was arresting him for violation of CPC 241[8] and 243[9]. **I told him to put his hands behind his back and as I grabbed his left arm from behind, he yanked his arm away from me and spun to his left. Newman yelled "you're not going to arrest me for this". As he spun he struck my left shoulder with his right arm. I then grabbed his left arm again and attempted to place a wristlock on him. He continued to try and pull away from me, so I attempted to trip him to the ground. As I attempted to trip him I slipped on the gravel and we both fell to the ground. I was on top of him and I used my radio Pac Set to call for assistance. Newman was still struggling and attempting to break free. I was holding him down and attempted to deploy my pepper spray. I removed my pepper spray from my duty belt and with one hand, attempting to hold him down. I could not get an accurate spray on Newman, the pepper spray had little or no affect on Newman** (emphasis added[10])."

Assisting Deputies arrived and Newman was handcuffed and placed in the back seat of a marked

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[8] Assault on a peace officer.

[9] Battery on a peace officer.

[10] Although the Petitioner disputes certain portions of the non-bolded text from Deputy Johnson's Initial Crime Report, the bolded portion of the text from that portion of the report that implicates Petitioner for violation of Cal. Penal Code § 148(a)(1).

patrol unit. During my attempt to arrest Newman, I suffered several small cuts and abrasions to my hands.

I transported Newman to the Orange County Jail, and booked him for violation of CPC 241(b) and CPC 243 (c) (1)."

Deputy Johnson repeated these material and knowingly falsely made statements in his "Crime Summary Information / Probable Cause Declaration / Bail Setting Information" form (for Petitioner's arrest) that was submitted to the Judicial Officer at the Orange County Jail who approves probable cause for arrests[11], and at Petitioner's underlying criminal trial. In that probable cause declaration, Deputy Johnson stated under penalty of perjury:

> **"Newman exited his vehicle and appeared very irate. Since he was out of his car, I attempted to conduct a search of his person. I told him to turn around and he complied. When I told him I was going to search him for weapons I grabbed his left arm. He yelled "Your [sic] not going to arrest me for this". He yanked his arm away from me, turned and hit me with his right forearm striking me on my left shoulder. I grabbed his arm again and tripped him to the ground, and attempted to handcuff him. Newman continued to fight and struggle until back up units arrived."** (emphasis added.)

C. Additional Factual Items

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[11] Pursuant to *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (requiring that a judicial officer make a probable cause determination for a warrantless arrest within 48 hours.)

In addition to the above and foregoing, during Mr. Steering's representation of Petitioner in the underlying criminal action, he discussed the facts and circumstances of the December 17, 2001 incident with all of the Deputy District Attorneys who appeared for prosecution in that action, and pleaded with them to dismiss the criminal action against Petitioner on the ground that Johnson was fabricating his allegations that Petitioner pushed, shoved, or otherwise resisted, obstructed or delayed Johnson. Mr. Steering even requested in writing that Deputy District Attorney ("DDA") Jenae Noell permit Petitioner to tell her his side of the story, in an effort to get her to dismiss the criminal action against him.[12]

Deputy Johnson apparently also concealed and/or destroyed what was apparently a micro cassette audio tape that most likely contained a recording of the actual December 17, 2001 incident complained of, made by Johnson himself. After testifying at Petitioner's criminal trial that he didn't know if he had audio recorded the December 17, 2001 incident, and that he was sure that he didn't listen to his micro-cassette tape recorded at the scene or at all that day to hear if the incident had been recorded, after having been shown a video tape of him listening to it at the scene, Deputy Johnson then shortly thereafter "admitted" (confession,

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[12] The April 25, 2002 letter from Jerry L. Steering to DDA Jenae Noell stated:

> "I realize that the above-shown list of discovery demands, is quite substantial. However, the defendant does need the above-demanded evidence, to defend himself in this action. I would also like to point-out to you, that you are prosecuting an innocent man. I know that you are a young DDA, and that you really are in no position to buck the system. However, you are a public prosecutor, and your duty is to seek the truth. If you are interested in finding-out what happened, please permit Mr. Newman to tell you his side of this sad story."

not mistake) that he had listened to his tape recorder that day, that he had put the tape into evidence, that he was not aware that the District Attorney's Office had claimed throughout Petitioner's criminal prosecution that no such tape existed, **and that it was unfair to Petitioner to have to stand trial without the benefit of Deputy Johnson's audio tape.**

On November 7, 2002 a jury acquitted Petitioner of violation of Cal. Penal Code § 148(a)(1), and on December 13, 2002, Petitioner subsequently filed this instant action for, *inter alia*, violation of 42 U.S.C. § 1983, for arrest without probable cause (U.S. Const. Amend. 4), violation of freedom of speech (U.S. Const. Amend. 1), unreasonable force (U.S. Const. Amend. 4), and malicious prosecution (U.S. Const. Amends. 1,4 and 14).

D. Respondent's Second Motion For Summary Adjudication On Plaintiff's Claim For Damages Suffered From His Criminal Prosecution.

On February 13, 2004, the County defendants - respondents (including Johnson) filed their second motion for summary judgment on Petitioner's malicious prosecution claim[13], and on February 19, 2004 Petitioner filed his opposition to said motion. The County defendants' new summary judgment motion was predicated on the claim that because the only evidence that the Petitioner presented on the issue of the material falsity of Deputy Johnson's arrest report and probable cause declaration was Petitioner's sworn but "uncorroborated" version of the subject December 17,

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[13] Their first motion for summary judgment on plaintiff's malicious prosecution claim was only based on the existence of probable cause, which was denied by the District Court, finding that a jury could find probable cause lacing in this case.

2001 incident that contradicted Johnson's material factual allegations regarding the December 17, 2001 incident, that the defendants - respondents were entitled to summary judgment on Petitioner's malicious prosecution claim. That is, defendants claimed that under *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. 1994), Petitioner could not rebut the presumption of independent prosecutorial judgment [14] by merely Petitioner's own sworn testimony, without some independent corroboration, because a malicious prosecution plaintiff's sworn but uncorroborated testimony is somehow not competent / sufficient evidence to show that Johnson's reports deceived District Attorney's Office, resulting[15] in the filing of a

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[14] In *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986), the Ninth Circuit Court of Appeals held:

> "A plaintiff who proves that police arrested him without probable cause is entitled to compensation for the economic and non-economic damages he incurs as a proximate result of these violations. *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1988). Reasonable attorney's fees incurred by the plaintiff can constitute part of the foreseeable economic damages, unless the prosecutor's decision to file charges is such an independent judgment that it must be considered the proximate cause of the subsequent criminal proceedings. . . . . there is a rebuttable presumption that a prosecutor exercises independent judgment regarding the existence of probable cause in filing a complaint. The presumption can be overcome, for example, by evidence that the officers knowingly submitted false information or pressured the prosecutor to act contrary to her independent judgment. Smiddy I at 266-267. Unless overcome, however, the presumption insulates the arresting officers from liability for harm suffered after the prosecutor initiated formal prosecution."

[15] "Resulting" in the sense that the Orange County District Attorney's Office relied on those material false and misleading representations of fact in deciding to criminally prosecute Petitioner for resisting / obstructing / delaying a peace officer engaged in the performance of his duties.

bogus criminal action against appellant for violation of Cal. Penal Code § 148(a)(1) (resisting / obstructing / delaying peace officer.) Accepting that proposition of law as controlling, that *Sloman v. Tadlock* created some sort of corroboration requirement[16] for a plaintiff seek post-filing damages[17] to rebut the presumption of prosecutorial independent judgment, on March 19, 2004, the district court issued an Amended Order granting the County defendants' motion for summary judgment on appellant's malicious prosecution claim (fifth cause of action).

On March 5, 2004, at the pre-trial conference before the district court in this action, the court notified Petitioner's counsel regarding the issuance of its original March 4, 2004 order granting summary judgment, and Petitioner's counsel was able to persuade the district court that an interlocutory appeal of that order would be proper and appropriate.

Subsequently, on March 19, 2004, the district court issued an "Amended Order Granting Defendants' Motion For Summary Judgment On Malicious Prosecution Claim", that included a certification by the district court for interlocutory appeal of the order granting the County defendants summary judgment on Petitioner's malicious prosecution claim.

On March 29, 2004, Petitioner filed his Petition For Permission To Appeal Order (28 U.S.C. § 1292(b); F.R.App.P. 5) with the Ninth Circuit, and on June 23, 2004, the Ninth Circuit granted the petition for interlocutory appeal.

In affirming the ruling of the District Court, the Ninth Circuit has now expressly created a new rule of evidence; contrary to the mandate of F.R.Civ.P. 56(c and e), contrary to F.R.E. 301, contrary to all applicable case

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[16] That is, corroboration of the plaintiff's version of the events.

[17] For injuries suffered by the plaintiff following the filing of criminal charges against him / her.

law from all of the federal circuits (including the Ninth Circuit's own precedent) and from this honorable Court itself. This new rule regarding rebutting the presumption of independent prosecutorial judgment (rebutting the presumed regularity of governmental actions) simply states that the prosecutor is presumed to have used his / her independent judgment in deciding to file and/or pursue a criminal action against a plaintiff who is seeking compensation for damages for such criminal proceeding, cannot be rebutted by the plaintiff's own sworn but uncorroborated testimony, that refutes and disputes the material issues of fact contained in the arresting - defendant police officer's arrest report, upon which the prosecution relied in so deciding to criminally prosecute the plaintiff:

> "In summary, the fact that a plaintiff's version of an incident conflicts with that of the law enforcement officers involved is not enough to defeat the presumption that a prosecutor exercises independent judgment. A plaintiff who presents only such evidence cannot survive summary judgment on a malicious prosecution claim. Newman's evidence is therefore insufficient to rebut the presumption, and the district court's grant of summary judgment on his malicious prosecution claim is therefore AFFIRMED" (*Newman v. County of Orange, et al.*, 457 F.3d 991 (9th Cir. 08/07/2006), Appendix, 11a.

Moreover, in an attempt to justify their new rule, the Ninth Circuit advanced the novel (and misplaced) proposition that the purpose of the presumption of prosecutorial independent judgment (in deciding to file criminal charges) arises from a policy decision to limit police liability, notwithstanding, that the genesis of the

rule is one of common law principles of causation in tort cases; not who we desire to be liable.

> "Indeed, Newman's argument[18] would effectively nullify the presumption entirely. We are hard-pressed to conceive of a malicious prosecution case in which the plaintiff's version of events would not conflict with the arresting officer's account. **In virtually every case, then, the presumption would be rebutted, and it would never limit the liability of the officer, contrary to its stated purpose**" (emphasis added) Appendix, 9a.

This reasoning is compounded by the lack of understanding that the Ninth Circuit exhibited regarding what the presumption is, why it exists, and how it can be rebutted.

E. The Ninth Circuit Misconstrued Basic Common Law Tort Causation Analysis, As Well As Its Own Precedent, That Of The Other Federal Circuits, And That Of This Honorable Court, In Affirming The Ruling Of The District Court

The presumption of independent prosecutorial judgment is merely a rule that has been judicially created so that a defendant police officer is not held liable for damages for injuries suffered by a criminal prosecution of his / her arrestee, because the actions of the prosecutor in filing the criminal action is "presumed" to have been the product of the prosecutor's

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[18] That the plaintiff's sworn testimony that contradicts the material statements of fact upon which the prosecutor relied in deciding to file and maintain a criminal action against the plaintiff is sufficient to rebut the presumption of independent prosecutorial judgment.

independent judgment, that broke the chain of causation between the arrest of the plaintiff (accompanied by the defendant's filing of materially false arrest reports) and the subsequent criminal prosecution of the plaintiff. In virtually all of the federal circuits, this presumption of prosecutorial independent judgment can be rebutted by showing that the public prosecutor's decision to criminally prosecute was not the product of his / her independent judgment (an intervening superceding act that broke the chain of causation), but was the product of the police deceiving the prosecutor as to what the true facts of the subject event were (i.e. materially false incriminating police reports), or the product of the police using improper pressure on the prosecutor to cause him / her to act contrary to his / her independent judgment. See, *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986)[19].

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[19] In *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986), the Ninth Circuit Court of Appeals held:

> "A plaintiff who proves that police arrested him without probable cause is entitled to compensation for the economic and non-economic damages he incurs as a proximate result of these violations. *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1988). Reasonable attorney's fees incurred by the plaintiff can constitute part of the foreseeable economic damages, unless the prosecutor's decision to file charges is such an independent judgment that it must be considered the proximate cause of the subsequent criminal proceedings. . . . . there is a rebuttable presumption that a prosecutor exercises independent judgment regarding the existence of probable cause in filing a complaint. **The presumption can be overcome, for example, by evidence that the officers knowingly submitted false information or pressured the prosecutor to act contrary to her independent judgment.** Smiddy I at 266-267. Unless overcome, however, the presumption insulates the arresting officers from liability for harm suffered after the prosecutor initiated formal prosecution." (emphasis added.)

Based on this presumption of regularity accorded to prosecutorial decisionmaking, the various federal circuits have likewise held that the prosecutor's decision to file and/or maintain a criminal action is presumed to have been the product of the prosecutor's independent judgment, unless the plaintiff rebuts this presumption by showing evidence that the prosecutor failed to use his / her independent judgment in deciding to file and/or maintain the underlying criminal action. In virtually all of these cases, the plaintiff can "rebut" this presumption by showing evidence that the defendant(s) (usually the arresting - police officer(s) and/or the author(s) of the materially bogus arrest reports) provided false material information or material omissions of fact to prosecuting authorities (upon which they relied in deciding to file criminal charges), or that the police used undue pressure on the prosecutor to get him / her to act contrary to their otherwise independent judgment.

For example, in *Townes v. City of New York*, 176 F.3d 138 (2d Cir. 1999), the Second Circuit held:

> "It is well settled that the chain of causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment. *See*, Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989) (intervening decisions of prosecutor, grand jury, Judge, and jury); Hand v. Gary, 838 F.2d 1420, 1427-28 (5th Cir. 1988) (magistrate or grand jury); Smiddy v. Varney, 665 F.2d 261, 266-68 (9th Cir. 1981) (prosecutor), adhered to, 803 F.2d 1469, 1471-72 (9th Cir. 1986); Duncan v. Nelson, 466 F.2d 939, 943 (7th Cir. 1972) (sentencing Judge). **At least that is so in the absence of evidence that the police officer misled or pressured the**

official who could be expected to exercise independent judgment." (emphasis added.)

In *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), the Eleventh Circuit held:

> "The intervening acts of the prosecutor, grand jury, judge and jury -- assuming that these court officials acted without malice that caused them to abuse their powers - each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendant policemen. *See also, Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988) (in section 1983 action based on false arrest, grand jury or other independent intermediary breaks chain of causation unless defendant policemen mislead intermediary); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) (decision of prosecutor to charge or grand jury to indict does not shield police officer who deliberately supplied misleading information); *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000) (actions under 42 U.S.C. § 1983 are reviewed like common law tort claims and require a proximate cause analysis . . . moreover, a prosecutor, sentencer or other court officials will only constitute an intervening cause [in the chain of causation] if the decision is genuinely free from deception or coercion); *Myers v. County of Orange*, 157 F.3d 66, 74 (2d Cir. 1998) (a prosecutor's independent judgment in deciding to file criminal charges breaks the chain of causation between the defendant police officer's arrest and the resultant criminal prosecution, in the absence of a showing that the police officers deceived the prosecutors or

improperly pressured them, or conspired with them to maliciously prosecute.)

These cases all mirror the Ninth Circuit's own precedent in *Smiddy v. Varney, supra.*

F. The Ninth Circuit Misconstrued And Ignored The Common And Basic Principles Involving Summary Judgment Motions, And The Common And Basic Principles Of The Federal Rules Of Evidence, In Affirming The Decision Of The District Court.

1. The Testimony Of A Single Witness, Including A Party To An Action, May Be Sufficient To Show The Existence Of A Triable Genuine Issue Of Fact In Dispute For Summary Judgment Purposes.

"The burden of persuasion imposed on a moving party by Rule 56[20] is a stringent one. 6 Moore's Federal Practice • 56.153., p. 56-466; 10A Wright, A. Miller, & M. Kane, Federal Practice and Procedure 2727, p.124." *Celotex Corp. v. Catrett*, 477 U.S. 317,330 f.n.2, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (concurring opinion by Brennan, J.) Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250,255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (motion for summary judgment standard "mirrors the standard for a directed verdict under F.R.Civ.P. 50(a)[21]"), and any doubt as to the

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[20] F.R.Civ.P. 56.

[21] F.R.Civ.P. 50(a) provides: Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings.
(a)-- JUDGMENT AS A MATTER OF LAW:

existence of a genuine issue for trial should be resolved against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) " In reviewing the denial of a defendant's summary judgment motion, we are required to view the facts--which are taken from the pleadings, interrogatory responses, affidavits, and deposition--in the light most favorable to the plaintiffs." *Swint v. City of Wadley*, 5 F.3d 1435, 1439 (11th Cir.1993), modified, 11 F.3d 1030 (11th Cir.1994).

> "Summary judgment must be granted if the court determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). To determine whether there are any genuine issues of material fact, the court must first consult the applicable substantive law to ascertain what factual issues are material. The moving party bears the burden of coming forward with proof of the absence of any genuine issues of material fact through the identification of those portions of the pleadings, depositions, answers to the interrogatories, and admissions on file, together with any affidavits which it believes demonstrates the absence of any genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L. Ed.2d 265 (1986). The nonmovant

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(1)-- If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2)-- Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

> is then required to counter the motion for summary judgment. FED.R.CIV.P. 56(e). "Mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." Nicholas Acoustics, Etc. v. H & M Const. Co., Inc., 695 F.2d 839, 844 (5th Cir.1983) (quoting Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013, 1015 (5th Cir.1967)). **The court must then review all evidence bearing on those issues, viewing the facts and inferences in the light most favorable to the nonmoving party.** Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir.1990) (emphasis added.)"

Walton v. Alexander, 20 F.3d 1350 (5th Cir. 1994.)

> "The court must then review all evidence bearing on those issues, viewing the facts and inferences in the light most favorable to the nonmoving party. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir.1990)"

Walton v. Alexander, 20 F.3d 1350 (5th Cir. 1994.)

Moreover, when the material factual issues in the case are in dispute, and that dispute is shown by the sworn testimony of the plaintiff versus the sworn testimony of the defendant, given the standard of review at the summary judgment stage, the district court must accept the non-movant's version of the facts as true. *See also, Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1279 n.9 (11th Cir. 2002) (stating that a court must accept the non-movant's version of disputed facts as true for purposes of summary judgment).

This is so even when the non-movant's version of the material facts is only supported by the testimony of a single witness, though opposed by many declarations

to the contrary. *See, United States v. One Parcel of Real Property*, 904 F.2d 487,491-492 (9th Cir. 1990); *See also, Kingsland v. City of Miami*, No. 03-13331 (11th Cir. 2004) (in false arrest-malicious prosecution case, only evidence that off-duty police officer ran red light, and not the plaintiff, was plaintiff's word versus the policeman's; precluding summary judgment); *Weyant v. Okst*, 101 F.3d 845,854 (2d Cir. 1996) (defendant police officers not entitled to summary judgment on Section 1983 false arrest claim even though evidence on summary judgment swearing contest between officer and plaintiff-arrestee); *Thompson v. Sweet*, 194 F.Supp.2d 97 (N.D.N.Y. 2002) (plaintiff's testimony alleging fabrication of material facts by police contained in affidavit for arrest warrant in opposition to police officer's summary judgment motion on false arrest and malicious prosecution claims sufficient to raise triable issue of fact on issue of liability of police for subsequent criminal action); *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3rd 1027, 1039 (9th Cir. 2005) ("While a factfinder is free to conclude at trial that the plaintiff's account is insufficiently detailed to be believable, the district court must refrain from making such credibility assessments on summary judgment. As long as a reasonable factfinder could conclude that discrimination [or other violation of constitutional rights] occurred, summary judgment must be denied.").Summary judgment motions:

> ". . . by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in

his favor. Adickes, 398 U.S., at 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. . . "

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250,255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)

2. **Because The Testimony Of A Single Witness, Including A Party To An Action, May Be Sufficient To Show The Existence Of A Triable Genuine Issue Of Fact In Dispute For Summary Judgment Purposes, The Ninth Circuit Erred In Awarding Summary Adjudication On Petitioner's Malicious Prosecution Claim.**

a. **<u>the Ninth Circuit misidentified the material issue of fact in dispute</u>.**

As stated by this honorable court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986):

"Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere

existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes. More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Id., 477 U.S. at 47-248

In its published opinion in this action, the Ninth Circuit's erroneous result apparently emanated from its

misunderstanding of what the material facts that were in issue, were:

> "**First, Newman's argument places the focus on the wrong party. The question, under Smiddy, is not whether the prosecutor, in the face of conflicting accounts, would have filed charges based on the plaintiff's story, but whether she would have done so based on the officer's.** Prosecutors generally rely on police reports-not suspect's stories-when deciding whether charges should be filed. We presume they rely on their independent judgment when deciding whether such reports warrant the filing of criminal charges, unless contrary evidence is presented. If charges are filed, Smiddy protects the officers unless such evidence shows that officers interfered with the prosecutor's judgment in some way, by omitting relevant information, by including false information, or by pressuring the prosecutor to file charges. A suspect's account of an incident, by itself, is unlikely to influence a prosecutor's decision, and thus, it cannot, by itself, serve as evidence that officers interfered with the prosecutor's decision.
>
> Indeed, Newman's argument would effectively nullify the presumption entirely. We are hard-pressed to conceive of a malicious prosecution case in which the plaintiff's version of events would not conflict with the arresting officer's account. In virtually every case, then, the presumption would be rebutted, and it would never limit the liability of the officer, contrary to its stated purpose."

Newman v. County of Orange, Appendix 8a-9a.

As stated above, the presumption of independent prosecutorial judgment involves issues of causation; that is the law presumes that the filing of a criminal action against the plaintiff by a public prosecutor breaks the chain of causation between the arrest of the plaintiff (and the officer's accompanying arrest report(s), and the plaintiff's criminal prosecution, as the prosecutor's actions are presumed to have been the product of his / her independent judgment. Unrebutted, the presumption then insulates the police officer from liability to the plaintiff for damages suffered by the plaintiff for injuries arising out of, or otherwise accompanying his / her criminal prosecution.

Also as shown above, to rebut this presumption of prosecutorial independent judgment, the plaintiff needs to show either that the police officer deceived the prosecutor [22] or, by showing, that the police used improper pressure to cause the prosecutor to file criminal charges, contrary to the prosecutor's independent judgment. After all, a prosecutor cannot be deemed to have used their independent judgment in deciding to prosecute the plaintiff if the information upon which the prosecutor relied in making that decision was materially false and incriminating, and the true facts would be exculpatory.. Therefore, for summary judgment purposes involving the presumption of prosecutorial independent judgment, the genuine material factual inquiry is whether the police deceived the prosecutors or used undue pressure on them to get them to file the underlying criminal action (when if the true facts were known or if improper pressure was not exerted on the prosecutor, no criminal prosecution would have happened.)

As shown above, if anyone is in a position to give testimony as to whether the police officer's version of

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[22] Such as by making material false incriminating statements in the officer's arrest report, or by making material omission of material fact that tend to incriminate the plaintiff.

the material events are true, its is the plaintiff. Therefore, the plaintiff's sworn version of the material events that contradict the material statements of fact upon which the prosecutor relied in deciding to file the underlying criminal action against the plaintiff, does, in fact rebut the presumption of prosecutorial independent judgment. That being said, the Ninth Circuit's new requirement that the plaintiff's sworn testimony that contradicts the material statements of fact (or material omissions of fact) upon which the prosecutor relied in deciding to criminally prosecute the plaintiff), be corroborated by additional evidence (in order to rebut the presumption) violates the mandates of this honorable court, of every federal circuit, and of F.R.Civ.P. 56 and F.R.E. 301, regarding the sufficiency of evidence necessary to defeat a summary judgment motion. To require a plaintiff to show evidence that corroborates his version of the genuine material facts in disputes relegates a district court to weighing the evidence, making credibility determinations and drawing inferences; functions that are for a jury, not a judge. *See, Anderson v. Liberty Lobby, supra.*

Moreover, such a corroboration requirement violates F.R.E. 301, that provides:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. [Adopted 1975].

A presumption is a procedural rule affecting the finder of fact. Under this procedural rule, if a basic fact is

established, then the fact-finder must accept that the presumed fact has also been established, unless the presumption is rebutted.[23]. Failure to present sufficient evidence to create a presumption may result in the case being taken from the jury when the presumed fact is one of the elements of a particular claim[24]. However, a "presumption is not evidence and may not be given weight as evidence."[25] Although a presumption is not a form of evidence, it has evidentiary value[26]. A presumption can have the effect of shifting burdens of proof: (1) the burden of coming forward with the evidence (the burden of production), (2) the burden of persuasion, or (3) both. Presumptions serve one or more of four distinct functions: (1) they serve to "avoid a factual impasse" when direct proof of the presumed fact is unavailable; (2) they shift the burden of persuasion on an issue; (3) they permit the judge to instruct the jury on

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[23] Morgan, *Basic Problems of Evidence* 32 (1962.)

[24] *See, e.g., Klein v. Trustees of Indiana Univ.*, 766 F.2d 275, 280-281 (7th Cir. 1985) (in employment discrimination claims subject to *McDonnell Douglas-Burdine* burden-shifting method of proof, "dismissal at the close of the plaintiff's case-in-chief is proper if the plaintiff fails to present a prima facie case of discrimination".)

[25] *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171, 58 S. Ct. 500, 82 L. Ed. 726 (1938) (presumption that violent death is accident rather than suicide would apply only on fact of violent death without more; in this case, evidence that death was not accident removed foundation for application of presumption, so case should be decided "upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed"); *See also, Routen v. West*, 142 F.3d 1434, 1439 (Fed. Cir. 1998) ("This court has never treated a presumption as any form of evidence," so change in presumption about effect of military service on pre-existing diseases did not constitute new and material evidence to justify reopening veteran's case.)

[26] *See, e.g., Forshey v. Gober*, 226 F.3d 1299, 1304 (Fed. Cir. 2000) (presumption relieves party of burden of "having to produce specific evidence to establish the point at issue," but disappears on rebutting evidence of requisite strength).

the relationship between facts; and (4) they allocate burdens of production[27]. Under Rule 301, the effect of a presumption is to shift to the other party the burden of production, that is, the burden of going forward with evidence to rebut or meet the presumption[28]. Rule 301 says nothing about how much evidence is needed to rebut a presumption, although the evidence necessary to rebut will be less than the burden of persuasion in the case. The opponent of the presumed fact, in order to rebut, generally has the burden of presenting enough evidence so that a reasonable jury could be convinced of the non-existence of the presumed fact[29]. This

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[27] Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L. Rev. 843, 845 (1981.)-

[28] F.R.E. 301; *See, Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27, 96 S. Ct. 2882, 2898, 49 L. Ed. 2d 752 (1976) (effect of each presumption was to shift burden of going forward with evidence from plaintiff claimant to defendant mine operator.)

[29] Amount of evidence needed to rebut presumption. *See, In re Dodd*, 82 B.R. 924, 928, 929 (Bankr. N.D. Ill. 1987) ("under [Fed. R. Evid. 301] a party may rebut a presumption by introducing evidence which would support a finding of the non-existence of the presumed fact"); *United States v. Bailey*, 707 F.2d 19, 22 (1st Cir. 1983) (burden imposed on defendants to rebut presumption that stock value was value indicated by stock exchange quotations "[was] not to prove that the stock was valueless or that it had a particular value lower than that urged by the government, but only to come forward with enough evidence to support a finding that the stock exchange quotations [were] not a reliable indicator of the actual value of the stock on the day in question"); *Sinatra v. Heckler*, 566 F. Supp. 1354, 1358-1359 (E.D.N.Y. 1983) ("[i]n order to rebut the presumption that a notice of reconsideration is received five days after it is dated, the claimant must adduce evidence that would be sufficient to overcome a directed verdict"); *North Mississippi Communications, Inc. v. Jones*, 874 F.2d 1064, 1069 (5th Cir. 1989) (in First Amendment civil rights case, "once a plaintiff has demonstrated that an impermissible motive played a motivating part in his adverse treatment, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision in the absence of the protected conduct", citing *Mt. Healthy City School District v. Doyle*, 429 U.S.

evidentiary requirement has been variously described as the need to come forward with "only some evidence" [30], or the amount of evidence "that would be sufficient to overcome a directed verdict."[31] In light of these well established principles regarding the function and application of evidentiary presumptions, and in light of F.R.Civ.P. 56, the respondents' claim that the Ninth Circuit court created some sort of exception to these rules, or could have created some sort of exception to

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274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (burden initially placed on plaintiff to show that constitutionally protected conduct was "substantial factor" in Board's decision not to rehire him, then trial court "should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."); *In re Dodd*, 82 B.R. 924, 928, 929 (Bankr. N.D. Ill. 1987) ("under [Fed. R. Evid. 301] party may rebut presumption by introducing evidence which would support a finding of the non-existence of the presumed fact"); *Clay v. Traders Bank of Kansas City*, 708 F.2d 1347, 1351 (8th Cir. 1983) (presumption of insolvency 90 days before filing bankruptcy petition requires party against whom presumption exists to come forward with "only some evidence of solvency," "substantial evidence" was not applicable test); *Rice v. Office of Servicememb' Group Life Ins.*, 260 F.3d 1240, 1248-1249 (10th Cir. 2001) (presumption in favor of mental capacity under federal law in insurance cases can be rebutted by a preponderance of the evidence).

[30] *See, Clay v. Traders Bank of Kansas City*, 708 F.2d 1347, 1351 (8th Cir. 1983) (presumption of insolvency 90 days prior to filing of bankruptcy petition requires party against whom presumption exists to come forward with "only some evidence of solvency".)

[31] *Sinatra v. Heckler*, 566 F. Supp. 1354, 1359-1360 (E.D.N.Y. 1983) ("[i]n order to rebut presumption that notice of reconsideration is received five days after it is dated, claimant must adduce evidence that would be sufficient to overcome a directed verdict"); *See also, Howing Co. v. Nationwide Corp.*, 927 F.2d 263, 265 (6th Cir. 1991) , vacated on other grounds, 502 U.S. 801 (1991) (because defendant in securities action did not establish lack of significance of information omitted from its proxy statements with sufficient clarity to entitle it to directed verdict on issue, it was not entitled to summary judgment).

these rules, is without merit. For policy reasons the federal circuits may have created a rebuttable presumption that the prosecutor acted pursuant to his/her independent judgment in pursuing a criminal action against a malicious prosecution or false arrest plaintiff. However, the Ninth Circuit cannot create a rule that contravenes F.R.Civ.P. 56, F.R.E. 301 or simple logic itself.[32]. A malicious prosecution plaintiff's sworn testimony is just as competent evidence to show the material falsity of a crime report relied on by the prosecutor, as is sworn testimony by a bus full of nuns, and he doesn't need independent corroboration to make his sworn testimony competent evidence.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's August 7, 2006 published opinion, transparently faulty - as it may be, will necessarily result in the encouraging misconduct by police officers against innocent citizens, when the police are aware that there are no witnesses around to see the abuse. In essence, a malevolent lie by a police officer defendant cannot be rebutted by a contrary version of the incident solely by plaintiff, unless there is some extrinsic support for plaintiff's version of the discrepancy. This is not just erroneous; this is outrageous, and frankly, un-American. There is no reason why a man like Rex Newman cannot have his day in court. There is no reason that a police officer, such as Deputy Johnson, should be able to frame a person with impunity, and destroy presumptively[33]

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[32] Otherwise, it would be arbitrary and capricious, in violation of the Fourteenth Amendment.

[33] In *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991),cert. denied, 503 U.S. 962, 112 S.Ct. 1567, 118 L.Ed.2d 212 (1992), the court observed that "a trier of fact may draw an adverse inference from the destruction of evidence relevant to a case. *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir.1988). The adverse inference is

exculpatory evidence (i.e. his presumed audio recording of the subject incident). Why would this honorable court be willing to permit a district court to deem sworn testimony of police officer necessarily substantially more credible than that of his victims ? Why would this honorable court permit the dawn of the official police state in the Western states in our country ? Why would this honorable court permit the Ninth Circuit to fashion its own rules regarding summary judgment motions and evidentiary presumptions, when those rules necessarily conflict with the Rules established by Congress and by this honorable court ?

It is difficult enough for a citizen to win a swearing contest with a police officer. The published

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based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir.1982). Indeed, the trial court may, in its discretion, shift the burden of proof to the party responsible for destruction/withholding of evidence.

In this case, the defendant officer may have deliberately destroyed or withheld an audiotape recording he made during the encounter which would be the sort of independent evidence demanded by the panel's interpretation of *Sloman*_to support Newman's version of the events the prosecutor relied upon to file criminal charges of resisting, delaying or obstructing a peace officer. Cal. Penal Code § 148(a)(1). In this context destruction of evidence by a party serves as cause to instruct the jury on adverse inferences it may draw. *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir.1988)) or justify shifting the burden of proof to the defendant, See, *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir.1982).

opinion of the Ninth Circuit now makes it impossible. The continued existence of the Ninth Circuit's ruling in *Newman* requires District Judges to make credibility rulings (as to how much corroboration is needed). This honorable court cannot stand by as the alter of freedom is desecrated.

CONCLUSION

In *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. 1994), the Ninth Circuit held that mere conclusory allegations by a plaintiff seeking damages for injuries suffered by him for a bogus criminal prosecution, are insufficient to rebut specific factual allegations by a police officer as to what happened between the two. There is nothing, *per se*, wrong with that rule. However, when a plaintiff seeking damages for his bogus criminal prosecution shows specific allegations of material facts that specifically contradict the facts contained in a police report, the presumption of prosecutorial independent judgment must evaporate. By the Ninth Circuit expanding the meaning of *Sloman* to an absurd rule of law, they have told the American people that if they don't have evidence to corroborate the fact that the police attempted to frame them, they have no remedy for the loss of their liberty, damage to their reputation and integrity, emotional devastation, and their expenditure of thousands of dollars defending baseless criminal charges. That is not the American way. Accordingly, a Writ of Certiorari should issue in this case to correct this matter, or at least, this honorable court should summarily reverse the Ninth Circuit's ruling in this case.

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No. 04-56103

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REXFORD LEROY NEWMAN, JR.,

Plaintiff-Appellant,

v.

COUNTY OF ORANGE; MATTHEW JOHNSON; JEFFREY PUSKAS,

Defendants-Appellees.

April 4, 2006, Argued and Submitted, Pasadena, California

August 7, 2006, Filed

COUNSEL: Jerry L. Steering, Law Office of Jerry L. Steering, Newport Beach, California, argued the cause for the appellant and filed a brief.

David D. Lawrence, Franscell, Strickland, Roberts & Lawrence, Orange, California, argued the cause for the appellee; Christina M. Sprenger and Jorge Chica were also on the brief.

JUDGES: Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain, Circuit Judges, and Robert C. Jones, * District Judge.

OPINION BY: Diarmuid F. O'Scannlain

OPINION: O'SCANNLAIN, Circuit Judge:

We must decide what evidence a civil rights plaintiff alleging malicious prosecution must produce to overcome the presumption that a prosecutor exercises independent judgment in choosing to file charges.

I

Shortly before Christmas in 2001, Orange County Deputy Sheriff Matthew Johnson ("Johnson"), a motorcycle officer, initiated a traffic stop of Rexford Leroy Newman, Jr. ("Newman"), in San Juan Capistrano, California. After Johnson handed him a traffic citation for speeding, Newman asked if there was any chance he could receive a warning instead of a citation. According to Johnson, Newman explained that he had been in the Air Force and was a 30-year veteran pilot in the airline industry. Newman claims that he told Deputy Johnson only that he had not had a ticket in the previous sixteen years and that his father was a deputy sheriff. Newman eventually signed the citation and was given a copy of the ticket. As Johnson turned to go, Newman said, "I hope you have a Merry Christmas." The two disagree about what happened next.

Johnson says that he walked back to his motorcycle and began writing his notes about the traffic stop. Newman started his car and accelerated back onto the highway, kicking up rocks and debris that then peppered Johnson and his motorcycle. Johnson got back on his motorcycle and pulled Newman over again.

Johnson instructed Newman to get out of his vehicle, and Newman replied, "Why, just because of a little dirt? I don't see any dirt on you?" Newman then got out of his Jeep, and Deputy Johnson informed him that he was under arrest. Deputy Johnson's initial crime report describes what happened next:

> I told him to put his hands behind his back and as I grabbed his left arm from behind, he yanked his arm away from me and spun to his left. Newman yelled "you're not going to arrest me for this." As he spun he struck my left shoulder with his right arm. I then grabbed his left arm again and attempted to place a wristlock on him. He continued to try and pull away from me, so I attempted to trip him to the ground. As I attempted to trip him I slipped on the gravel and we both fell to the ground. I was on top of him and I used my radio pac set to call for assistance. Newman was still struggling and attempting to break free. I was holding him down and attempted to deploy my pepper spray. I removed my pepper spray from my duty belt and with one hand, attempting to hold him down. I could not get an accurate spray on Newman, the pepper spray had little or no affect [sic] on Newman.
>
> Assisting Deputies arrived and Newman was handcuffed and placed in the back seat of a marked patrol unit.

B

By comparison, Newman claims that, after receiving his speeding ticket, he replaced all of his documentation,

checked his mirrors, and pulled back into the flow of traffic. After traveling 150-200 feet, he moved into the left turn lane when he again saw Deputy Johnson's motorcycle behind him, blue lights flashing.

Johnson pulled up beside Newman and yelled at him to pull to the curb. When Newman asked if he could complete his left turn, Johnson screamed at him to "pull to the right curb now." Newman did as instructed, and Deputy Johnson yelled at him to step out of the car. Newman again complied and noticed that Johnson was talking into his radio while standing in a dangerous spot in the road. He yelled at Johnson "to get out of the traffic, you're going to get hit."

When Johnson finished with his radio, he told Newman to "go sit on the curb." Newman walked to the curb and turned to sit, and as he did, he saw Johnson running and spraying pepper spray towards him. As the pepper spray hit Newman's arm, he turned his body to the left, raising his right arm to protect his face. Despite this, the pepper spray got in his face, and Newman closed his eyes to protect them. Then Johnson hit him in the back, knocking Newman to the ground and yelling at him to "get prone on the ground."

At that moment, Johnson's backup began arriving, including Deputy Jeffrey Puskas. With Puskas' assistance, Johnson handcuffed Newman, searched him, and placed him in a patrol car. Johnson then drove Newman to the Orange County jail for booking.

C

After Newman's arrest, the Orange County District

Attorney's Office filed a misdemeanor criminal action against him for speeding and for resisting, obstructing, or delaying a peace officer in violation of California Penal Code § 148. A jury acquitted Newman of all charges.

Following his acquittal, Newman filed suit under 42 U.S.C. § 1983 against Johnson, Puskas, and Orange County, alleging over a dozen causes of action, including malicious prosecution. The defendants filed a motion for summary judgment, which the district court granted on Newman's malicious prosecution claim, finding that he was unable to overcome the presumption that the prosecutor had exercised independent judgment.

Newman sought leave to bring this interlocutory appeal, and we granted his request. We review the district court's grant of summary judgment *de novo*. *Delta Savings Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001).

II

Newman presents two arguments on appeal. First, he claims that the district court misinterpreted our previous pronouncements concerning the evidence required to rebut the presumption that a prosecutor exercises independent judgment. Second, assuming the district court's interpretation was correct, Newman insists that he produced sufficient evidence to overcome the presumption. We address his arguments in turn.

A

We have long recognized that "[f]iling a criminal complaint immunizes investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981) (*Smiddy I*). The plaintiff bears the burden of producing evidence to rebut such presumption. Newman argues that he rebutted the presumption with his account of his arrest. Our cases suggest otherwise.

1

We first identified the presumption in *Smiddy I*, 665 F.2d at 266. There, an individual cleared of a murder charge brought suit under 42 U.S.C. § 1983 against the officers responsible for his arrest. *Id.* at 263-64. After a jury found for the plaintiff, the officers appealed, claiming that they were not liable for damages suffered after the district attorney filed the formal complaint. *Id.* at 266. We agreed, noting that

> [a] police officer's lot already is unfortunate because it is he who often is the only actor in the chain of decisions leading to prosecution who is subject to section 1983 liability. We need not make it more unfortunate by holding the officer liable for damage that is the result of the intervening fault of others in the chain. The existence of the possibility of absolute liability on the part of the municipality or governmental unit

> further underscores the justice of limiting the liability of the police officers.

Id. at 267. This justified a rebuttable presumption that a prosecutor exercises independent judgment in deciding to file charges. After identifying such presumption, we returned the case to the district court to determine whether the plaintiff was able to rebut the presumption. *Id.* at 268.

Following the remand, the district court granted summary judgment to the plaintiff. We reversed, holding that the plaintiff had failed to meet his burden. *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986) (*Smiddy II*). He produced no evidence "that the district attorney was subjected to unreasonable pressure by the police officers, or that the officers knowingly withheld relevant information with the intent to harm [him], or that the officers knowingly supplied false information." *Id.* Thus, "the presumption was sufficient to require summary judgment" for the defendant officers. *Id.*

2

Our later cases further explained the types of evidence necessary to overcome the presumption. In *Borunda v. Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1988), we affirmed an award of damages that included attorneys' fees incurred defending against criminal charges of which the plaintiffs were acquitted. The prosecutor based the decision to prosecute solely on the information contained in the officers' reports, but the plaintiffs highlighted striking omissions in the those reports as well as the fact that the officers themselves

offered conflicting stories. *Id.* On the basis of such evidence, "[t]he jury was entitled to find . . . that [the officers] procured the filing of the criminal complaint by making misrepresentations to the prosecuting attorney." *Id.* Thus, the plaintiff had rebutted the presumption of independent judgment, and the attorneys' fees were properly included in the calculation of damages. *Id.*

In *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991), a similar case, we held that a civil rights plaintiff seeking attorneys' fees as damages had also produced sufficient evidence to overcome the *Smiddy* presumption. There, as in *Borunda*, the prosecutor relied solely on the arresting officers' reports, which omitted critical information. *Id.* at 1137. Further, an independent witness corroborated at least part of the plaintiff's version of events, and the officers' accounts conflicted. *Id.*

In contrast, we have stated that a plaintiff's account of the incident in question, by itself, does not overcome the presumption of independent judgment. *Sloman v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994). *Sloman*, like *Borunda* and *Barlow*, involved whether attorneys' fees could be counted as damages. Like those cases, prosecutors relied exclusively on reports submitted by officers. However,

> Sloman did not and does not point to any evidence of . . . fabrication other than the fact that the officers' reports were inconsistent with Sloman's own account of the incidents leading to his arrest. Such conclusory allegations, standing

> alone, are insufficient to prevent summary judgment.

Id. Because Sloman had no evidence of material omissions, or inconsistent police or eyewitness accounts, he could not demonstrate a genuine issue of material fact as to whether the prosecutor exercised independent judgment. Summary judgment for the defendant officers was therefore appropriate. *Id.*

3

Although *Sloman* addressed whether a plaintiff could recover attorneys' fees incurred in defending a criminal prosecution, we see no reason to apply its rule narrowly. Therefore, *Sloman*'s rule should apply to malicious prosecution claims, including Newman's. Newman contends, however, that *Sloman* means only that an officer is not liable for damages" if a malicious prosecution plaintiff's version of the subject events is different than the police version, but the prosecutor would have filed" a criminal action based even on the plaintiff's version.

We decline to read *Sloman*'s clear statement so narrowly. First, Newman's argument places the focus on the wrong party. The question, under *Smiddy*, is not whether the prosecutor, in the face of conflicting accounts, would have filed charges based on the *plaintiff's* story, but whether she would have done so based on the *officer's*. Prosecutors generally rely on police reports--not suspect's stories--when deciding whether charges should be filed. We presume they rely on their independent judgment when deciding whether such reports warrant the filing of criminal charges,

unless contrary evidence is presented. If charges are filed, *Smiddy* protects the officers unless such evidence shows that officers interfered with the prosecutor's judgment in some way, by omitting relevant information, by including false information, or by pressuring the prosecutor to file charges. A suspect's account of an incident, by itself, is unlikely to influence a prosecutor's decision, and thus, it cannot, by itself, serve as evidence that officers interfered with the prosecutor's decision.

Indeed, Newman's argument would effectively nullify the presumption entirely. We are hard-pressed to conceive of a malicious prosecution case in which the plaintiff's version of events would *not* conflict with the arresting officer's account. In virtually every case, then, the presumption would be rebutted, and it would never limit the liability of the officer, contrary to its stated purpose.

We must therefore reject Newman's argument. To rebut the presumption of independent judgment and to survive summary judgment on a malicious prosecution claim, a plaintiff must provide more than an account of the incident in question that conflicts with the account of the officers involved.

B

Newman finally argues that he introduced sufficient evidence to rebut the *Smiddy* presumption.

I

First, Newman claims that "Deputy Johnson's probable

cause declarations contradicted several of the material issues of fact shown in his Initial Crime Report." There are some differences in the two documents. In his initial crime report, Johnson says that he told Newman to get out of his vehicle, while in the probable cause declaration, Johnson only says that Newman "exited his vehicle." In the crime report, Johnson states that he told Newman to put his hands behind his back, but in the probable cause declaration, Johnson says that he attempted to search Newman and told him to put his hands behind his back. We are not persuaded that these discrepancies are material.

The probable cause declaration and the initial crime report agree that Newman reacted violently when Johnson informed him that he was being arrested; he yelled, "You're not going to arrest me for this," and hit Johnson with his right arm. A struggle ensued that ended only when backup officers arrived to help subdue Newman. The minor differences in the two accounts do not concern Newman's resistance or Johnson's response. As such, they have no bearing on whether Johnson interfered with the prosecutor's independent judgment because they do not concern the conduct for which Newman was ultimately charged--resisting, obstructing, or delaying an officer.

2

Second, Newman offers the fact that Deputy Johnson initially denied listening to his personal audio tape recorder on the day of Newman's arrest, but later changed his story after being confronted with a video that showed him doing just that. Johnson stated that he believed his tape was already full when he arrested

Newman and that he turned the tape in after his shift. The tape was never located, and the record contains no evidence as to what it did or did not contain. More importantly, neither Johnson's probable cause declaration nor his initial crime report say anything about whether he did or did not listen to his recorder. We are not convinced that the fact that an officer may have forgotten, over a year after the fact, that he listened to an audio recording that may or may not have recorded anything can, by itself, be considered "ample evidence from which a reasonable jury could conclude that the arresting officers, through false statements and material omissions in their reports, prevented the prosecutor from exercising independent judgment." *Barlow*, 943 F.2d at 1137.

3

We therefore conclude that Newman failed to provide sufficient evidence to overcome the presumption of independent judgment.

III

In summary, the fact that a plaintiff's version of an incident conflicts with that of the law enforcement officers involved is not enough to defeat the presumption that a prosecutor exercises independent judgment. A plaintiff who presents only such evidence cannot survive summary judgment on a malicious prosecution claim. Newman's evidence is therefore insufficient to rebut the presumption, and the district court's grant of summary judgment on his malicious prosecution claim is therefore

AFFIRMED.

Footnotes

* The Honorable Robert C. Jones, United States District Judge for the District of Nevada, sitting by designation.

Filed 3/19/2004
Case No. 02-1152-GLT(MLGx)

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION

REXFORD NEWMAN, JR., Plaintiff,

vs.

COUNTY OF ORANGE, et al., Defendants.

AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON MALICIOUS PROSECUTION CLAIM

Defendants' motion for summary judgment on Plaintiff's malicious prosecution claim is GRANTED.

I. BACKGROUND

Plaintiff Newman was pulled over by Defendant Deputy Johnson on December 17, 2001 for speeding. After receiving a citation, Johnson claims Newman accelerated quickly back onto the road, spraying Johnson with sand and debris. Johnson pulled over Plaintiff a second time for assault and battery. Johnson claims Newman became "physically combative" as he tried to handcuff him and Johnson called for assistance. Defendant Deputy Puskas arrived on the scene and helped subdue Plaintiff.

Johnson arrested Newman for assault and battery and resisting, obstructing, or delaying a peace

officer. Newman was prosecuted only on the resisting, obstructing, or delaying charge, and was acquitted at trial. On February 9, 2004, the Court granted Defendants' motion for summary judgment on Plaintiff's Monell, conversion, and trespass to chattels claims. The Court also found Defendant Deputy Puskas is entitled to qualified immunity. The Court ordered additional briefing on Plaintiff's malicious prosecution claim, which it now addresses.

II. DISCUSSION

Police officers are ordinarily immune from damages suffered after the filing of a criminal complaint "because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981). A plaintiff can rebut the presumption if the prosecutor relied on materially false police reports. Id. at 266-67.

Plaintiff argues Defendants made material false representations of fact in the police report, which the district attorney's office relied on in filing the underlying criminal action against Plaintiff. The evidence provided by Plaintiff to support this position is Plaintiff's counsel's declaration about conversations with prosecutors, and references to Plaintiff's deposition. The conversations with prosecutors do not provide evidence of a fabricated police report. Plaintiff's declaration states Plaintiff's account of the incident which is inconsistent with the officer's account in the police report.

The rule in the Ninth Circuit is that the fact the officer's report is inconsistent with Plaintiff's version of events is insufficient to rebut the presumption of the prosecutor's independent judgment. Sloman v. Tadlock, 21 F.3d 1462, 1474 (9th Cir. 1994), accord: Peterson v. Cazemier, 164 F. Supp 2d 1217, 1222-24 (D. Oregon, 2001) (conclusory statements or recitations of events that differ from defendants' are not sufficient).

Plaintiff's showing fails to raise a triable issue. Plaintiff's account of the incident which contradicts the officer's version is not sufficient. The presumption of the prosecutor's independent judgment is not rebutted.

At this late date in the case, it is inappropriate to reopen discovery for more depositions.

III. DISPOSITION

Defendants' motion for summary judgment on the malicious prosecution claim is GRANTED.

IV. APPEAL CERTIFICATION

The Court is of the opinion this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this order may materially advance the ultimate termination of the litigation

Filed: 9/14/2006

No. 04-56103

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REXFORD LEROY NEWMAN, JR.,

Plaintiff-Appellant,

v.

COUNTY OF ORANGE; MATTHEW JOHNSON; JEFFREY PUSKAS,

Defendants-Appellees.

ORDER

Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain, Circuit Judges, and Robert C. Jones, * District Judge.

The panel has voted unamously to deny the defendant-appellant's petition for rehearing. Judge O'Scannlain has voted to deny the petition for rehearing en banc, and Judges Nelson and Jones so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en bane are DENIED.

Footnotes

* The Honorable Robert C. Jones, United States District Judge for the District of Nevada, sitting by designation.

Rule 56(c) of the Federal Rules of Civil Procedure ("F.R.Civ.P.") states:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

F.R.Civ.P. 56(e) states: "(e) (Form of Affidavits; Further Testimony; Defense Required)

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rules 56(c and e) have been interpreted to mean that if the nonmoving party (for summary judgment / summary adjudication of issue) presents evidence that shows the existence of a genuine material issue of fact in dispute, then summary judgment / summary adjudication is inappropriate, as such issues can only be decided by the trier of fact.

Federal Rules of Evidence ("F.R.E.") 301 Presumptions in General Civil Actions and Proceedings) provides:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

Under F.R.E. 301, the effect of a presumption is to shift to the other party the burden of going forward with evidence to rebut or meet the presumption. The opponent of the presumed fact, in order to rebut, generally has the burden of presenting enough evidence so that a reasonable jury could be convinced of the non-existence of the presumed fact. Rule 301's evidentiary requirement has been variously described as the need to come forward with only some evidence, or the amount of evidence that would be sufficient to overcome a directed verdict.